SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET N W
WASHINGTON, D C 20005
(202) 736 8000
(202) 736 8711 FAX

mjwarren@sidley com
(202) 736 8996

BEIJING
BRUSSELS
CHICAGO
DALLAS
FRANKFURT
GENEVA
HONG KONG
LONDON
LOS ANGELES

NEW YORK
PALO ALTO
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D C

FOUNDED 1866

September 29, 2011

By Hand Delivery

Rachel D. Campbell
Director
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Office of Proceedings
SEP 29 2011
Part of
Public Record

231007

Re: Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., STB Docket No. 42121

Dear Ms. Campbell:

Enclosed for filing in the above-referenced matter is Defendant CSX Transportation, Inc.'s ("CSXT's") Motion to Strike certain portions of Total Petrochemicals USA, Inc's ("TPI's) Rebuttal Market Dominance Evidence. The filing includes an original and ten copies of the Highly Confidential version of CSXT's Motion, and an original and ten copies of the Public version of the Motion.

Please stamp one copy of each version of CSXT's Motion to indicate it has been received and filed and return the stamped copy with our messenger for our files. Thank you for your assistance in this matter.

If you have questions, please contact the undersigned.

Very truly yours,

Matthew J. Warren

Enclosures

cc: Jeffrey O. Moreno

PUBLIC VERSION
HIGHLY CONFIDENTIAL INFORMATION REDACTED

SEP 29

BEFORE THE
SURFACE TRANSPORTATION BOARD

TOTAL PETROCHEMICALS USA, INC. Complainant, v. CSX TRANSPORTATION, INC. Defendant.	Docket No. NOR 42121

231004

MOTION TO STRIKE

SEP 29 2011

Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Hanna M. Chouest
Marc A. Korman
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to CSX Transportation, Inc.

Dated: September 29, 2011

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

TOTAL PETROCHEMICALS USA, INC. Complainant. v. CSX TRANSPORTATION, INC. Defendant.	Docket No. NOR 42121

MOTION TO STRIKE

"Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered." *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001) ("*SAC Procedures*"). The Rebuttal Evidence submitted by Total Petrochemicals USA, Inc. ("TPI") in this proceeding violates this bedrock principle in multiple ways. TPI uses its Rebuttal Evidence to introduce a brand-new theory that transloading could affect the "product integrity" of the issue commodities (never mind the fact that TPI transloads {{ }} of railcars of the issue commodities every year). It devotes a section of its Rebuttal to recounting twenty-year-old testimony from a merger proceeding that it claims supports its case, without even attempting to explain why this supposedly relevant testimony was not presented on Opening. It presents new evidence to support its claim that "inventory carrying costs" should be used to {{ }} inflate the costs of alternative transportation – despite failing to include this evidence either in its Opening Evidence or in its responses to CSX Transportation, Inc. ("CSXT") workpaper requests directly asking for that support. And most egregiously of all, TPI claims that the Board cannot consider competitive transportation options that are identical to options TPI presented in its own Opening

Evidence because of a newly-minted legal theory that the Board cannot consider whether an intermodal competitive option is effective unless it moves between the exact interchange points named in the complaint. TPI's use of its Rebuttal to introduce new evidence, advance new arguments, and reverse positions it took on Opening cannot stand. This is precisely the sort of sandbagging that the Board's rules are designed to prevent, and the Board should strike this improper evidence.

The narrative of TPI's Rebuttal Evidence is nearly three times as long as the narrative of its Opening Evidence. *Compare* TPI Opening Narrative Section II-B (41 pages without lane descriptions and 147 pages including lane descriptions) *with* TPI Rebuttal Narrative Section II-B (117 pages without lane descriptions and 374 pages including lane descriptions). TPI also waited until Rebuttal to unveil two new witnesses: (1) Robert Granatelli, the only non-TPI-employee witness it presents to support its allegations that rail-truck transportation is not effective competition for the issue lanes; and (2) Jim Parks, the only witness with accounting responsibilities to testify in support of TPI's inventory carrying cost allegations.[1] TPI's decision to produce Rebuttal Evidence that is significantly lengthier and more detailed than its Opening Evidence is troubling in light of the Board's repeated admonitions that litigants must present their entire case-in-chief in opening evidence.[2] Nevertheless, CSXT has taken a conservative approach to this Motion and moves to strike only those sections of TPI's Rebuttal that plainly fall outside the scope of appropriate rebuttal evidence.

---

[1] It is noteworthy that one of those witnesses devotes substantial testimony to ad hominem attacks on one of CSXT's expert witnesses, *see* TPI Rebuttal at II-B-13 through II-B-14, in view of the fact that TPI's tactic of withholding these witnesses until rebuttal effectively insulates them from similar criticism.

[2] *See, e.g.*, *SAC Procedures*, 5 S.T.B. at 446; *Duke Energy Corp. v. Norfolk Southern Railway Co.*, 7 S.T.B. 89, 101 (2003) ("*Duke v. NS*"); *Public Service Co. of Colo. d/b/a Xcel Energy v. BNSF Ry. Co.*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003) ("*Xcel v. BNSF*").

Because the Board is considering market dominance on an expedited basis, in order to avoid undue delay CSXT believes that the Board should strike the improper rebuttal evidence and proceed to consider the case on the current record (or after oral argument, should the Board choose to schedule one). If the Board chooses not to strike some of the improper rebuttal discussed in this motion, however, CSXT respectfully requests an opportunity to respond to the improper evidence and to amend its Reply Evidence as necessary to respond to arguments and evidence that TPI should have included in its Opening Evidence.

I. REBUTTAL IS NOT AN OPPORTUNITY FOR A PARTY TO RAISE NEW ARGUMENTS OR PRESENT NEW EVIDENCE THAT COULD AND SHOULD HAVE BEEN INCLUDED IN OPENING EVIDENCE.

The fairness of the Board's proceedings rests in part on the fundamental due process principle that a party should be afforded an opportunity to respond to the other party's evidence and arguments. In a rate reasonableness case, this means that each side's evidence should be subjected to full adversarial testing – the complainant's opening evidence through the defendant's reply, and the defendant's reply evidence through the complainant's rebuttal. But the adversarial process works only when parties submit their full case-in-chief in opening evidence and give the other party "a fair opportunity to reply" to that evidence. *Xcel v. BNSF*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003) ("The interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other's evidence.").[3] The Board therefore has recognized the need for strict limits on the scope of rebuttal evidence to prevent complainants from "saving" evidence for rebuttal that could have been presented on opening:

[3] *See also Duke v. NS*, 7 S.T.B. at 101 ("[T]he shipper must plan to submit its best, least-cost, fully supported case on opening. It may not hold back to see the railroad's reply evidence before finalizing or supporting its own case[.]").

> [T]he party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal presentations are limited to responding to the reply presentation of the opposing party. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.

SAC Procedures, 5 S.T.B. at 445-46 (emphasis added). Rebuttal evidence is an opportunity for a complainant to respond to criticisms of its opening evidence or to demonstrate that "the railroad's reply evidence is itself unsupported, infeasible or unrealistic." *Duke v. NS*, 7 S.T.B. at 101. However, a complainant may not "alter the core assumptions upon which its case-in-chief is based" on rebuttal. *Id.* And under no circumstances may it present evidence or arguments that could have been presented on opening, under the guise of "responding" to the defendant's reply evidence. *See SAC Procedures*, 5 S.T.B. at 445-46. The Board has made clear that it is "troubled" by incidents where complainants have used rebuttal as a mechanism to submit evidence that should have been submitted on opening,[4] and it has not hesitated to strike improper rebuttal evidence that does not comply with the strictures of *SAC Procedures*.[5]

---

[4] *Xcel v. BNSF*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003) ("We are increasingly troubled by the submission of incomplete or erroneous evidence on opening in a SAC case and a complainant's reliance upon an opportunity to address deficiencies through later evidentiary submissions, to which the defendant has no opportunity to respond.").

[5] *See, e.g., Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. NOR 42071 (served Jan. 27, 2006) (striking rebuttal evidence seeking to modify complainant's original cost-of-capital calculations, which defendant had relied upon in its reply evidence and to which defendant had no opportunity to respond); *Duke Energy Corp v. CSX Transp., Inc.*, STB Docket No. NOR 42070, slip op. at 4 (served Mar. 25, 2003) ("*Duke v. CSXT*") (striking rebuttal evidence where complainant's change to yard configuration had "gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by CSX"); *Texas Mun. Power Agency v. BNSF Ry. Co.*, STB Docket No. NOR 42056 (served Mar. 24, 2003) (refusing to rely on new maintenance-of-way evidence first presented on rebuttal).

II. TPI'S IMPROPER REBUTTAL EVIDENCE SHOULD BE STRICKEN.

A. TPI's Assertion of a New Legal Theory That Directly Contradicts Positions TPI Took On Opening Is Improper Rebuttal.

TPI devoted a significant portion of its Rebuttal to a newfound argument that the Board cannot consider the competitiveness of any intermodal alternative to a joint rail movement that does not originate at the precise CSXT "origin" named in the Complaint and terminate at the precise CSXT "destination" named in the Complaint (even if that origin and destination do not represent the initial origin and final terminus of the movement). According to TPI, "the Board may only consider market dominance for the movement between the points covered by the challenged CSXT rate." TPI Rebuttal at II-B-78. TPI bases this new theory on its interpretation of *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Co.*, 4 S.T.B. 288 (1999) ("*DMIR*"), a case it did not even bother to cite in its Opening Evidence. But the issue here is not simply that TPI failed to assert this theory on Opening – it is that TPI's Rebuttal theory is diametrically opposed to its treatment of this issue in Opening Evidence. Indeed, over a hundred of the alternative transportation options that TPI itself analyzed in its Opening Evidence flunk the "*DMIR* test" it first asserted on Rebuttal. Every direct truck option and many of the rail-truck options set forth in TPI's Opening Evidence were not between the CSXT origin and the CSXT destination named in the Complaint; instead, TPI postulated direct truck options that would replace the entire rail movement (including non-CSXT carriers' portion of the movement) and a number of rail-truck options for customers served by short lines that would replace both the CSXT and short line portions of the movement. In fact, many of the CSXT proposals that TPI's Rebuttal lambasted as prohibited by its *DMIR* test are mirror images of options proposed in TPI's Opening Evidence.

Specifically, TPI devoted a significant portion of its Opening Evidence to discussing the purportedly high costs of direct truck alternatives – not one of which was "between the points covered by the challenged CSXT rate." TPI Rebuttal at II-B-78. Every truck alternative in TPI's Opening Evidence originates at a TPI production facility in Texas or Louisiana, not the interchange point where CSXT's rail service begins. *See* TPI Opening at II-B-42 n.52 (admitting that the direct truck rates TPI posited contemplated a truck route "from TPI's production facility, or nearby SIT yard, to the customer's facility, which may not be the same as the rail destination"). In fact, TPI Opening Workpaper "TPI Op. Ex. II-B-4 workpaper – v1.xls" shows that TPI identified {{ }} direct truck routes that commenced at the TPI plant origin – not the CSXT interchange origin. *See id.* at Column G. And {{ }} of these routes postulated delivery to the actual TPI customer destination – not the interchange destination listed in the Complaint. *See id.* at Column J. So while in the Lane Descriptions of its Rebuttal TPI dismisses any intermodal alternative that does not originate and terminate at the precise interchange points named in the Complaint as using the "Wrong origin" or "Wrong destination," TPI did the exact same thing in Opening Evidence. *See, e.g.*, TPI Rebuttal at II-B-258 & II-B-261. It is impossible to reconcile TPI's Opening approach of evaluating competitive options from the actual shipment origins to actual customer destinations with its Rebuttal claims that evaluating such options would constitute "geographic competition."

Similarly, TPI's Opening Evidence identified several rail-truck transload options where the final truck delivery would be made to the ultimate customer (even if CSXT was a bridge carrier on that lane and did not serve the ultimate customer). TPI Opening Workpaper "Transload Cost Analysis.xlsx" identifies {{ }} TPI customers on issue lanes served by short line carriers that according to TPI could be served by truck deliveries to the customer

facility – not to the short line interchange. *See id.* at Sheet "STB Exhibit II-B-5" Column M. For example, on Lane B-66 (New Orleans to Wareco. GA) TPI proposed a rail-truck transload option to its ultimate customer in Waresboro, GA – not to the CSXT-St. Marys West interchange in Wareco. *See* TPI Opening at II-B-103; TPI Opening WP "Transload Cost Analysis.xlsx" at Sheet "STB Exhibit II-B-5" Column M at Row 75. But when CSXT proposed a near-identical transloading alternative for Lane B-66,[6] TPI reversed field and proclaimed that this alternative was impermissible because it "omitted the shortline railroad." TPI Rebuttal at II-B-83. TPI used the exact same "gotcha" tactics on Lanes B-10, B-74. and B-80 – all lanes where TPI proposed transloading options that bypassed the delivering short line carrier on Opening and then turned around on Rebuttal to condemn CSXT for doing the same. *Compare* TPI Opening WP "Transload Cost Analysis.xlsx" at Sheet "STB Exhibit II-B-5" Column M at Rows 15, 16, 84, 92, and 93 *with* TPI Rebuttal at II-B-84.

The audacity of TPI's blatant reversal is breathtaking, and CSXT submits that the Board must not permit this kind of gamesmanship. Complainants simply cannot be allowed to withhold legal arguments for rebuttal that could and should have been asserted on opening. Nor should they be permitted to bait defendants into accepting and addressing the complainant's positions on opening only to attack those same positions on rebuttal. The integrity and fairness of the Board's proceedings requires that this improper new argument be stricken.

There is little question that TPI's new *DMIR* argument "could and should have been submitted on opening to support the opening submissions." *SAC Procedures*. 5 S.T.B. at 446. CSXT's Motion for Expedited Determination of Jurisdiction over Challenged Rates proposed

---

[6] {{

}}

that several lanes could move through alternative Mississippi River gateways (*e.g.*, that a movement could be interchanged to NS at New Orleans rather than to CSXT at Memphis). *See* Motion for Expedited Determination of Jurisdiction Over Challenged Rates at 10 n.8 (filed Oct. 1, 2010). Despite being on clear notice of CSXT's position that such a gateway shift is not geographic competition, TPI failed to raise any legal objection to these intermodal alternatives in its Reply to that Motion or in its Opening Evidence. If TPI believed that the only intermodal competition that can be considered by the Board is transportation that originates and terminates at the interchange points named in the Complaint – a theory that would foreclose not only any gateway shifts but also any intermodal alternative at all for movements to short line interchange points – then it was incumbent on TPI to advance that theory on Opening and give CSXT a fair opportunity to rebut it or potentially reformulate its Reply Evidence to account for TPI's position. *See SAC Procedures*, 5 S.T.B. at 446; *Union Pac. Corp. et al. – Control – Chicago & N.W. Transp. Co.*, Finance Docket No. 32133 (Decision No. 20) (ICC served Sept. 16, 1994) ("*UP – Control – CN&W*"), *available at* 1994 WL 498541, at *4 (granting motion to strike rebuttal evidence that introduced "a theory not previously advocated").

More importantly, having proposed on Opening that the Board consider intermodal alternatives to the Issue Movements that were not limited to alternatives between the CSXT complaint "origins" and "destinations," and having induced CSXT to respond with similar evidence of such alternatives, TPI has waived its ability to alter that position. A shipper may not "alter the core assumptions upon which its case-in-chief is based" on rebuttal. *See Duke v. NS*, 7 S.T.B. at 101. Here, a core assumption of TPI's market dominance evidence was that intermodal alternatives were not cost-competitive with CSXT's rail service, and in proposing those intermodal alternatives TPI did not limit them to transportation between the CSXT

complaint origin and complaint destination. CSXT responded with evidence that TPI inflated the costs of intermodal alternatives, and proposed intermodal alternatives that, like those proposed by TPI, were designed to provide service between the actual origin and actual destination and not necessarily the CSXT interchange "origin" and "destination" named in the Complaint. TPI cannot predicate its Opening Evidence on the assumption that intermodal alternatives that would fail its "*DMIR* test" are relevant to the market dominance analysis and then cry foul on Rebuttal because CSXT made the exact same assumption on Reply.

Indeed, TPI's suggestion that the Board "should find that market dominance conclusively exists" on any lane where CSXT did not propose an alternative between the complaint origin and complaint destination has matters exactly backwards. TPI Rebuttal at II-B-80. TPI had the burden of proving market dominance in its Opening Evidence, and if the Board agrees with TPI that alternative transportation that does not begin at the complaint origin and end at the complaint destination cannot be considered in the market dominance analysis, then it is TPI which has failed to disprove the existence of an effective intermodal alternative for every lane for which it posited an option that does not satisfy its new "*DMIR* test." Put differently, if TPI's argument is correct, then it has presented no cognizable evidence that direct truck transportation is not cost-competitive with CSXT service for any of the issue movements and no cognizable evidence that truck-rail transloading is not cost-competitive for every lane on which TPI proposed to truck commodities to the customers and not the interchange point.

TPI's tactics have prejudiced CSXT. Had CSXT known that TPI would argue that the Board cannot consider intermodal competitive options to CSXT rail service that do not originate at the CSXT Complaint "origin" and terminate at the CSXT Complaint "destination," CSXT could have included additional intermodal alternatives to address that argument. For example,

CSXT proposed that some of the challenged joint movements could move through different Mississippi River gateways, which would enable TPI to use its most cost-effective contract rates with other rail carriers to transport that traffic to transloading facilities. CSXT's proposal was made in reliance on TPI's own Opening Evidence use of intermodal alternatives that replicated more than the CSXT portion of joint movements. If TPI had complied with the Board's rules and raised its *DMIR* argument on Opening, CSXT might have chosen to include alternative routes in its Reply Evidence that precisely replicated the CSXT portion of joint movements.

CSXT also would have had the opportunity to fully respond to the legal arguments TPI first raised on Rebuttal. Notably. TPI does not argue that alternative transportation from the real-world origin to the real-world destination fails to reflect real-world competition – indeed, the Opening Evidence developed by its own in-house commercial and logistics personnel identified over a hundred intermodal options that did not meet that criteria. Instead, for the first time on Rebuttal, TPI argues that *DMIR* has created a legal regime under which the Board should ignore evidence of real-world intermodal competition between the actual TPI plant origin and the actual TPI customer destination unless that intermodal option precisely substitutes for CSXT's portion of a joint rail movement – and only CSXT's portion of that movement. TPI fails to acknowledge several critical distinctions between *DMIR* and this case, however.

First, *DMIR* addressed a preliminary discovery dispute over a hypothetical option that would have relied on a customized, exceptional arrangement involving the trucking of coal from the stockpile at one of the utility's other plants to substitute for rail delivery of high-volume unit trains. In contrast. what is at issue here is relatively low-volume carload traffic and a rail-truck

transloading option that TPI regularly uses to serve its customers. *See* CSXT Reply Ex. II-B-29 through II-B-30.

Second, the hypothetical option in *DMIR* was an option reminiscent of the geographic competition that was forbidden in *Market Dominance Determinations – Product and Geographic Competition*, 3 S.T.B. 937 (1998).[7] Here, on the other hand, TPI is asking the Board to reject supported evidence of real-world intermodal options similar or identical to those proposed in TPI's own evidence and similar or identical to rail-truck transload options TPI uses today. And here the intermodal options proposed by CSXT bear no resemblance to "geographic competition"; rather, they would take product in one continuous movement from the TPI plant origin to TPI's customer destination.[8]

Third, *DMIR* rested upon the Board's conclusion that restricting discovery into truck competition originating at the utility's Boswell plant would not "foreclose the carrier's opportunity to show lack of market dominance." *DMIR*, 4 S.T.B. at 293. Specifically, the Board held that DMIR would have been free to postulate a rail-truck transloading option with the transloading occurring at the DMIR interchange at Keenan rather than at the utility's Boswell plant. That Keenan option would have had the same number of loading events and the same logistical complexity as the Boswell option DMIR sought to demonstrate. That is not the

---

[7] *Product and Geographic Competition* defined "geographic competition" as "whether the complaining shipper can avoid using the defendant railroad by obtaining the same product from a different source or by shipping the same product to a different destination." *Product and Geographic Competition*, 3 S.T.B. at 937. The proposal in *DMIR* that the utility obtain coal by trucking it from its other plant is of a piece with "obtaining the same product from a different source." In contrast, every alternative transportation option proposed in CSXT's Reply Evidence would have the issue commodities originate at the same TPI plant origin and be delivered to the same TPI customer destination as they would using CSXT rail service.

[8] Despite TPI's strenuous objection to intermodal options that would use different gateways for issue movements, in the real world it regularly ships product to the same destinations via alternative gateways. *See, e.g.*, CSXT Reply Ex. II-B-7 {{
}}.

case here, particularly for movements where CSXT is a bridge carrier receiving issue traffic from western railroads at Mississippi River gateways and transporting the railcars to interchanges with short line carriers who serve the ultimate customers. While it would be technically feasible to transload the issue commodities into trucks at the gateway and then to have those trucks transload product back into railcars at the short line interchange for the short line to deliver to the customer by rail, that option is obviously less efficient and less competitive with all-rail service than an option in which trucks deliver product directly to the customer. Simply put, *DMIR* was premised on a factual scenario where there were no obvious differences between the potential competitiveness of truck transportation originating at the utility's other plant and truck transportation originating at the DMIR interchange. In this case, however, imposing TPI's newly-asserted *DMIR* theory would preclude evidence of the most efficient and effective real-world competition and only permit evidence of less-efficient options that would require multiple transloads.[9]

While TPI's failure to assert its *DMIR* theory on opening evidence has precluded CSXT from making the full response to that argument to which it is entitled, there are clear distinctions between the facts presented in *DMIR* and the facts in this case. And to the extent that dicta in *DMIR* suggests that in all cases the Board should ignore evidence of effective competitive options that does not precisely replicate the "origin" and "destination" of the defendant rail carrier's section of a joint movement, that dicta should be rejected as inconsistent with

[9] It should not be overlooked that TPI's new *DMIR* argument was paired with claims that railcars of the issue commodities cannot be transloaded at any location that is not a "TPI-approved" facility and that the issue commodities cannot be transloaded more than once. TPI therefore claims that real-world competition that would serve its customers is impermissible because of its new legal theory, and that intermodal competition that would satisfy its legal theory (by transloading product back into railcars at the short line interchange) is impossible. The theme of TPI's evidence is repeated: Heads I win, tails you lose.

Congress's unmistakable intent that the Board not exercise its rate reasonableness jurisdiction over any movement subject to effective intermodal competition.[10] Regardless, the Board does not need to address these issues in this litigation, because TPI's unfair tactics of saving its DMIR argument until Rebuttal is ample reason to reject it. It is plainly improper for TPI to use Rebuttal Evidence to advance a new legal theory that directly contradicts positions it took on Opening Evidence, and this improper Rebuttal should be stricken.

B. TPI's New Assertion that Transloading Damages the "Product Integrity" of the Issue Commodities Is Improper Rebuttal.

In some rate cases complainants have argued that transloading is not an effective competitive option because it could cause product contamination or otherwise adversely affect product quality. *See, e.g.*, Opening Evidence of M&G Polymers USA, LLC at II-B-27 through II-B-32, *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123 (filed June 5, 2011) ("*M&G v. CSXT*"); *FMC Wyoming Corp. v. Union Pac. R.R. Co.*, 4 S.T.B. 699, 720 (2000). TPI did not include such an argument in its Opening Evidence, however. Instead, TPI focused its evidence on arguments that CSXT possesses market dominance over TPI's

[10] TPI adopts language from *DMIR* arguing that 49 U.S.C. § 10707(a) requires intermodal competition for a bottleneck segment to be limited to that segment. TPI Rebuttal at II-B-78 through II-B-79. This attempt to parse the statute is not convincing. The statute certainly requires that the intermodal transportation be competition for the "transportation to which [the rate at issue] applies," but nothing in the statute suggests that the intermodal option must substitute for that segment and only that segment. Intermodal competition for a CSXT segment of a joint movement does not stop being effective because it would also replicate other carriers' portions of that joint movement. Consider a hypothetical two-carrier joint line movement between Origin A and Destination C that is subject to effective barge competition between Points A and C. If the shipper were to bring a rate complaint against both carriers, the Board could consider that barge competition. But what if the shipper were to enter a contract with one of the railroads from Point A to a landlocked Interchange B and then challenged the other railroad's rate from Interchange B to Destination C? Nothing has occurred to change the effectiveness of barge competition, and the fact that the barge competition would replace both carriers' portions of the joint movement certainly doesn't mean that it is not effective competition for the defendant carrier. But under TPI's theory the Board would be precluded from considering the effective barge competition between Points A and C.

traffic because TPI's customers allegedly prefer that TPI deliver product via rail transportation. The only reference in TPI's Opening Evidence to alleged product integrity concerns was a claim that customers purchasing issue commodities for use in medical applications "are extra sensitive to potential contamination from transloading." TPI Opening at II-B-24. CSXT's Reply Evidence responded to this limited argument, which applied only to the eight case lanes involving medical application customers. *See* CSXT Reply at II-56 through II-57.

On Rebuttal, however, TPI announced a new and radically broader theory of product contamination. TPI now alleges that "the risk of product contamination and degradation" from transloading is "a major reason" why all its customers supposedly prefer rail service and that supposed product damage from transloading "is a matter of the utmost concern to polymer users" – not just those using polymers in medical applications. TPI Rebuttal at II-B-21. TPI spends four pages of Rebuttal Evidence discussing the supposed product integrity concerns caused by transloading and cites the opinion of a new rebuttal witness, Robert Granatelli, as support for these arguments. *See id.* at II-B-21 through II-B-25.

TPI's new product integrity argument is a classic case of "new evidence that could and should have been submitted on opening." *SAC Procedures*, 5 S.T.B. at 446. There is no reason why TPI could not have included this evidence previously – just as M&G Polymers did in its opening evidence in Docket No. NOR 42123.[11] And there is no question that TPI's decision to

[11] It is worth noting that M&G supported its product integrity argument with claims that polyethylene terephthalate ("PET") was "more susceptible" to the supposed adverse effects of transloading than other plastic polymers like the issue commodities in this proceeding:

> PET is more susceptible to these [transloading-related] adverse effects than most other polymers. Polypropylene pellets, for example, are in the shape of spheres and, therefore, do not have nearly the abrasive quality of PET pellets, which are cylinder-shaped with sharp edges. Moreover, because PET pellets are more rigid, less force is required to create dust and fines when the pellets strike each other or the interior walls of the conveying tube, bulk truck, or rail car.

withhold its new product integrity argument until Rebuttal Evidence has significantly prejudiced CSXT. Had this argument been presented in Opening Evidence, CSXT could have marshaled significant arguments and evidence to respond to it. *Cf.* CSXT Reply Evidence at II-54 through II-62, *M&G v. CSXT* (filed July 5, 2011) (evidence responding to M&G claims of product degradation concerns, including testimony of two witnesses experienced in transloading and PET transportation). TPI's attempt to raise new product integrity arguments in Rebuttal Evidence is plainly improper, and the Board should strike this evidence. *See Duke v. CSXT*, STB Docket No. NOR 42070, slip op. at 4 (served Mar. 25, 2003) (refusing to accept complainant's rebuttal evidence that went "beyond simply seeking to support what it presented in its opening evidence"); *UP – Control – CN&W*, 1994 WL 498541, at *12 (granting motion to strike rebuttal evidence that improperly introduced new issues and theories that should have been included in responsive application).

C. The New Evidence TPI Introduced on Rebuttal for Its Inventory Carrying Costs Claims Is Impermissible Rebuttal.

As CSXT discussed in its Reply, the vast majority of the difference between TPI's and CSXT's estimates of the costs of intermodal alternatives derived from an "inventory carrying cost" that TPI claimed it would incur for any rail-truck shipment. *See* CSXT Reply at II-77. TPI's Opening Evidence support for this "inventory carrying cost" consisted of a mere four sentences in which it asserted that it issues invoices for rail shipments and truck shipments at

---

Opening Evidence of M&G Polymers USA, LLC at II-B-29, *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123 (filed June 5, 2011). Since M&G made a point of explaining that it had special product integrity concerns because of the difference between PET and other polymers like polypropylene, it is curious that TPI has claimed that its products require "product integrity" precautions nearly identical to those that M&G claimed were necessary for PET. *Compare* M&G Opening at II-B-31 (claiming that PET may only be transloaded once because of product integrity concerns) *with* TPI Rebuttal at II-108 through 110 (claiming that polypropylene and other plastic polymers can only be transloaded once because of product integrity concerns).

different times and that this practice would cause TPI to incur significant "inventory carrying costs" for any rail-truck shipment through a transload facility.[12] *See* TPI Opening at II-B-32. TPI did not include any workpapers or exhibits to support its asserted invoicing practices and the claimed effect that these practices would have on inventory costs; indeed it did not even bother to procure testimony from any TPI employee with responsibility for inventory accounting. TPI simply asserted that the costs exist and proceeded to calculate them.

After receiving TPI's evidence, CSXT asked TPI to produce workpapers that supported "its factual assertions that it accounts for truck and rail shipments differently in a way that creates additional inventory costs for truck shipments" and "any workpapers supporting its underlying allegation that TPI is entitled to claim these additional costs in the first place." CSXT Reply Workpaper folder "Inventory Carrying Cost followup" (email correspondence concerning CSXT's workpaper requests). TPI responded to that workpaper request by producing two invoices and by reiterating its Opening Evidence claim that issuing invoices for truck shipments and rail shipments at different times creates inventory carrying costs. *See id.* In light of that minimal response to its workpaper request and the bare-bones support TPI put forward for inventory carrying costs in its Opening Evidence, CSXT responded accordingly in Reply Evidence that, *inter alia*, these purported "inventory carrying costs" were unsupported and TPI had failed to produce any evidence that it considered such costs in the ordinary course of business. *See* CSXT Reply at II-76 through II-80.

TPI responded in its Rebuttal Evidence by unveiling new claimed support for inventory carrying costs that it failed to include in Opening Evidence and failed to produce in response to CSXT's direct workpaper requests. On Rebuttal TPI for the first time presented testimony from

[12] TPI then spent a few more sentences explaining how it calculated inventory carrying costs.

a witness with responsibility for TPI's accounting; for the first time claimed that inventory carrying costs are considered by TPI management when evaluating capital employed for TPI business units; for the first time presented federal agency statements referencing inventory carrying costs; and for the first time presented {{

.}} *See* TPI Rebuttal at II-B-96 through II-B-99. This new evidence not only was not produced on Opening; none of it was produced in discovery. TPI's decision to withhold this evidence until Rebuttal cannot be justified. TPI's delay has deprived CSXT of "a fair opportunity to reply" to TPI's inventory carrying cost claims, and the Board should strike this new evidence. *Xcel v. BNSF*, STB Docket No. NOR 42057, slip op. at 2 (served Apr. 4, 2003); *see Duke v. CSXT*, STB Docket No. NOR 42070, slip op. at 4 (served Mar. 25, 2003).[13]

D. TPI's Newly Cited Testimony from the UP-SP Merger Is Improper Rebuttal.

Finally, TPI chose for the first time on Rebuttal to cite 1996 testimony submitted by the Society of Plastics in opposition to the *UP/SP* merger as alleged support for TPI's market dominance arguments. *See* TPI Rebuttal at II-B-25 through II-B-28. This outdated testimony has little relevance to the issues in this proceeding and would be entitled to little weight in any event.[14] But it is hard to imagine a clearer case of evidence that could and should have been

---

[13] To be clear, TPI's specific responses to CSXT's Reply Evidence (although not particularly convincing) are appropriate Rebuttal Evidence. For example, TPI's attempt on pages II-B-100 and II-B-101 of its Rebuttal to rebut CSXT Reply Exhibits showing that {{

}} is legitimate Rebuttal Evidence. What is not legitimate Rebuttal Evidence is the new evidence TPI presents on II-B-97 through II-B-99 in a belated attempt to support the inventory carrying costs for which it provided no support in Opening Evidence.

[14] Indeed, the Board's decision in *UP/SP* rejected the Society of Plastics' arguments in several respects. *See Union Pac. Corp. et al. – Control & Merger – S. Pac. Rail Corp. et al.*, 1 S.T.B. 233, 394-96 (1996) (rejecting the plastics industry arguments that the UP/SP merger would

presented on Opening – this testimony has been in the public record for 15 years! If TPI believed that this testimony was important "confirming testimony" that somehow proved both the "needs" of polymer receivers for rail transportation and "the importance of product integrity," *id.* at II-B-25 & II-B-27, then it was incumbent on TPI to include it in its Opening case-in-chief. *SAC Procedures*, 5 S.T.B. at 446. TPI had a duty to present its "best . . . fully supported case on opening," and if it believed that this 1996 testimony supported its case it should have been submitted on Opening. *See Duke v. NS*, 7 S.T.B. at 101.

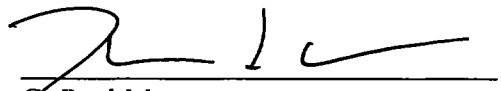
III. CONCLUSION

For the reasons detailed above, the Board should strike evidence contained in TPI's September 6, 2011 Rebuttal Evidence in the following areas: (i) new evidence and arguments claiming that the Board may not consider intermodal competitive options to CSXT rail service that do not originate at the CSXT Complaint origin and terminate at the CSXT Complaint destination; (ii) new evidence relating to alleged "product integrity" concerns from transloading; (iii) new evidence relating to TPI's alleged support for inventory carrying costs; and (iv) evidence relating to testimony from the *UP/SP* merger proceeding.

---

permit UP/SP to dominate the transportation of plastics, noting that "many plastics shippers continue to have rail transport options with carriers other than UP or SP, and about 15% of the plastics traffic is shipped by truck and intermodal transport," and finding that protestants overstated the traffic that would be exclusively served by the merged UP/SP).

Respectfully submitted,



Peter J. Shudtz
Paul R. Hitchcock
John P. Patelli
Kathryn R. Barney
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Paul A. Hemmersbaugh
Matthew J. Warren
Hanna M. Chouest
Marc A. Korman
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to CSX Transportation, Inc.

Dated: September 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2011, I caused a copy of CSX Transportation, Inc.'s foregoing Motion to Strike to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036

Eva Mozena Brandon